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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 322

N. E. POPE, ET AL.,

Petitioners,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

PETITIONER'S BRIEF IN RESPONSE TO COURT'S ORDER

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INDEX

Subject Index

	Page
Petitioners' brief in response to Court's order	1

Table of Cases Cited

A. C. L. R. Co. v. *Wood*, — Fla. —, 58 So. (2d) 549	3
A. C. L. R. Co. v. *Wood*, — Ga. —, 71 S.E (2d) 243	3
Boyd v. *Grand Trunk Western R. Co.*, 338 U.S. 263, 70 S. Ct. 26, 94 L. ed. 55	4
Brown v. *Western Ry. of Ala.*, 338 U.S. 294, 70 S. Ct. 105, 94 L. ed. 93	5
Cohen v. *Beneficial Ind. Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221, 93 L. ed. 1528	4
Miles v. *Illinois Central R. Co.*, 315 U.S. 698, 62 S. Ct. 827, 86 L. ed. 1129	3
Mooney v. *D. & R. G. R. Co.*, — Utah —, 221 Pac. (2) 629	3
Radio Station WOW, Inc. v. *Johnson*, 326 U.S. 120, 65 S. Ct. 1475, 89 L. ed. 2092	3
Republic Natural Gas Co. v. *Oklahoma*, 334 U.S. 62, 68 S. Ct. 972, 92 L. ed. 1212	2
Swift & Co. v. *Compania Colombiana*, 339 U.S. 684, 70 S. Ct. 861, 94 L. ed. 1206	4

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Respondent

PETITIONER'S BRIEF IN RESPONSE TO COURT'S ORDER

This brief is filed pursuant to the order of the Court made and entered on October 27, 1952 (unreported), which is as follows:

> "The petition for writ of certiorari in this case is granted. Counsel are requested to discuss in their briefs and on oral argument the question whether the judgment sought to be reviewed is final within the meaning of 28 U.S.C. Sec. 1257."

For the convenience of the Court we repeat here that portion of Petitioner's main brief (p. 2) which outlines the procedural background of this case:

> "IV. *Summary Statement of Matter Involved.*
>
> "Petitioner, a resident of Ben Hill County, Georgia, sued Respondent in the Circuit Court of Jefferson County, Alabama, under the Federal Employers' Lia-

bility Act for injuries sustained in Ben Hill County, Georgia.

"Approximately five months later Respondent filed suit in Ben Hill County, Georgia, to enjoin Petitioner from further prosecuting the Alabama suit on the grounds of expense, inconvenience, vexatiousness, harassment, burden on interstate commerce, more convenient forum in Georgia, and impeding the operation of Respondent's railroad and the national defense effort.

"Petitioner demurred generally to Respondent's petition and, after hearings, the Judge of Superior Court sustained the demurrer but granted supersedeas and enjoined Petitioner from further proceeding with the Alabama action pending final decision of the case by the Supreme Court of Georgia and receipt of remittitur therefrom.

"On appeal, the Supreme Court of Georgia reversed and Petitioner's motion for rehearing was denied. Petitioner's motion for stay of remittitur was granted to permit this Petition for Certiorari."

The question of finality has been troublesome to lawyers and judges alike. Mr. Justice Frankfurter, speaking for the majority in *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62, 68 S. Ct. 972, 92 L. Ed. 1212, termed the dividing line between "final judgments and non-final judgments" "faint and faltering at times" and said:

> "No self-enforcing formula defining when a judgment is 'final' can be devised."

But, unlike the judgment before the Court in that case, the judgment of the Supreme Court of Georgia has decided, conclusively for Georgia and for Pope, the only question of law in the case—and that question is a Federal question directly related to Federal statutes and to recent decisions of this Court construing such statutes. Thus, there is no possibility that the "matter left open (proof of the facts alleged in the petition) may generate additional Federal

questions" and violate "the policy against fragmentary review," which seems to be the basis for the majority's view in the *Republic Natural Gas Co.* case, *supra*. A decision by this Court would conclude the entire case once and for all—just as the decision below would have done, failing appeal,—as to the only legal question in the case. To deny review now and send the case back to the trial court for proof of facts which are conceded (and many of which the Court judicially knows) would serve no useful purpose but, rather, would unnecessarily prolong this litigation.

The Federal question is severable from the factual matters in this case, as in *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 65 S. Ct. 1475, 89 L. Ed. 2092, in which the Court expressed an exception to the general requirement of finality:

> "Only in very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for Federal appellate jurisdiction."

Serious public consequences might well follow a denial of review of this case. We know of at least three instances in which the question has been before state appellate courts: *A.C.L. R. Co.* v. *Wood*, — Fla. —, 58 So. (2d) 549, *A.C.L. R. Co.* v. *Pope*, — Ga. —, 71 SE (2d) 243, *Mooney* v. *D. & R. G. R. Co.*, — Utah —, 221 Pac. (2d) 629. And no doubt there are numerous others pending in trial courts or, perhaps, undecided on appeal.

Every decision of this Court carries serious public consequences. The Supreme Court of Georgia has held that *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698, 62 S. Ct. 827, 86 L. Ed. 1129, is no longer the law of the land. Whether the Georgia decision is right or wrong is a matter of serious concern and consequence, and it is important that it be reviewed.

The language in *Swift & Co. V. Compania Colombiana*, 339 U. S. 684, 70 S. Ct. 861, 94 L. Ed. 1206, quoting from *Cohen* v. *Beneficial Ind. Loan Corp.* 337 U. S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528, is equally applicable to the judgment under consideration here, in that it

> "appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated".

Finally, there is a striking parallel between this case and *Boyd* v. *Grand Trunk Western R. Co.*, 338 U. S. 263, 70 S. Ct. 26, 94 L. Ed. 55, cited and relied upon in our main brief:

Boyd's Case	*Pope's Case*
Nature of Action	
Enjoin defendant from proceeding in Illinois State Court under FELA.	Enjoin defendant from proceeding in Alabama State Court under FELA.
Where Brought	
Michigan State Court.	Georgia State Court.
Proceedings in Trial Court	
Motion to dismiss (equal to general demurrer under Michigan practice) sustained. Temporary injunction dissolved.	General Demurrer sustained. Supersedeas granted and restraining order issued against Pope pending appeal and receipt of remittitur.

Proceedings in State Supreme Court	
Reversed, Temporary injunction reinstated and case remanded for further proceedings.	Reversed. Restraining order continues in effect.
Status of Case upon Entering this Court	
Temporary injunction in effect. State Supreme Court decided points of law against employee.	Restraining Order in effect. State Supreme Court decided points of law against employee.

In the *Boyd* case the Court said:

> "Certiorari was granted, 337 U. S. 923, 93 L. Ed. , 69 S. Ct. 1166 (1949), because the federal and state courts which have considered the issue have reached conflicting results".

The case here presents an issue in which the state courts, which have given it consideration, have reached conflicting results. *A.C.L. R. Co.* v. *Wood,* supra, *A.C.L. R. Co.* v. *Pope,* supra, *Mooney* v. *D. & R. G. R. Co.,* supra. Because of the inherent nature of the issue, only state courts could consider it but, we submit, divergent views of state courts concerning a question arising under a Federal Act should have as strong an appeal to this Court to afford review and decide the issue as did the divergent views of state and federal courts in the *Boyd* case, supra. The reason stated for the grant of certiorari in *Brown* v. *Western Ry. of Ala.,* 338 U. S. 294, 70 S. Ct. 105, 94 L. Ed. 93, was that

> "—the implications of the dismissal were considered important to a correct and uniform application of the Federal Act in the state and federal courts".